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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-93

JAMES GEORGE STAFOS,
Bankrupt-Petitioner,

vs.

LAURENCE M. JARVIS, Trustee in Bankruptcy,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No. .....

JAMES GEORGE STAFOS,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, James George Stafos, bankrupt, prays that a writ of certiorari issued to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, which opinion was handed down April 30th, and the order of said Court overruling bankrupt's petition for rehearing was denied June 8, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported, it appears in the appendix to this Petition at pages A1-A10. The petition for rehearing was denied June

8, 1973, and appears in the appendix at pages A10-A15. The order denying the petition for rehearing appears in the appendix commencing at page A16. The opinion of the Referee in Bankruptcy is shown in the record on appeal to the Tenth Circuit (hereinafter referred to as Record on Appeal) at pages 7 to 29. The Memorandum Opinion of Honorable Earl E. O'Connor, Judge of the District Court for the District of Kansas, affirming the decision of the Referee in Bankruptcy is shown at pages A18-A21 of the appendix and at page 45 of the Record on Appeal. The motion to vacate the judgment of the District Court and apply the abstention doctrine is shown at page 50 of the Record on Appeal. The ordinance extending the City limits of Kansas City, Kansas, which included and took into the corporate limits of the City of Kansas City, Kansas, bankrupt's 13.2 acre truck farm, is shown at pages A21-A22 of the appendix. The stipulation between petitioner and the Trustee in Bankruptcy as to the bankrupt's homestead rights in his truck farm is shown in the appendix at page A22.

JURISDICTION

The opinion of the Court of Appeals was rendered April 30, 1973, and the petition for rehearing was denied May 31, 1973. The order denying the petition for rehearing was transmitted to counsel, and the Clerk of the Trial Court on June 8, 1973, together with a letter of transmittal. The order overruling the motion for rehearing and letter are shown in the appendix of this brief at pages A16-A17.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 11 U.S.C. 47.

QUESTIONS PRESENTED

The questions presented in this petition are:

1. Whether the City Ordinance passed without notice of any kind to bankrupt or opportunity to be heard enacted by the Board of Commissioners of the City of Kansas City, Kansas, March 1, 1966, extending the boundaries of the City (Appendix page A21), deprived petitioner of his vested interest in the 13.2 acre truck farm owned by bankrupt and his wife as joint tenants with the right of survivorship and not as tenants in common, without due process of law in violation of the 14th Amendment to the Constitution of the United States, for under the judgment of the Trustee in Bankruptcy affirmed by the District Court and the Court of Appeals, Tenth Circuit, the passage of the City Ordinance hereinabove referred to without notice or opportunity to be heard reduced petitioner's homestead rights in said truck farm from 13.2 acres to one acre. In other words, the judgment of the Court took all of the farming land away from bankrupt, leaving him only his residence on one acre, depriving bankrupt of the means by which he earned his livelihood from his homestead.

2. Whether the Trial Court as requested in the motion of bankrupt should have applied the abstention doctrine in the absence of a decision of the Supreme Court of Kansas as to whether the passage of a City Ordinance without notice annexing a farming homestead of more than one acre of land reduced the farming homestead right to one acre of land and, therefore, petitioner submits the Trial Court should have instructed the Trustee to file an action in the State Court to determine whether or not the passage of a City Ordinance extending the boundaries of a city automatically alienated and reduced the bankrupt's

farming homestead under Article 15, Section 9, of the Kansas Constitution, to one acre of land, for the Constitution of the State of Kansas provides and the Supreme Court of the State has consistently ruled that once a homestead has been established that it remains a homestead until such time as it is either abandoned as such or alienated by the joint consent of both husband and wife where that relation exists; and furthermore the Supreme Court of the State has held that the legislature of the State of Kansas is without power to enact any law restricting any rights guaranteed by the Constitution of the State. The legislature therefore in enacting 13-1602(a) of Kansas Statutes Annotated (the statute under which the annexation was had in this cause), if the same is valid, accomplished the reduction to one acre of a farming homestead indirectly which it could not accomplish directly thus circumventing the intent of the homestead exemption in the Constitution of Kansas.

3. Whether or not the passage of the City Ordinance annexing bankrupt's homestead and other lands to the City without notice of any kind, without a chance to be heard, and with no redress whatsoever, violated petitioner's right to due process under the 14th Amendment of the Constitution of the United States?

STATUTES INVOLVED

1. The 14th Amendment of the Constitution of the United States.

2. Section 6, of the Bankruptcy Act (11 U.S.C. 24), provides that a bankrupt's property shall be exempt to him as prescribed by the laws of the United States or by state laws.

3. Article 15, Section 9, of the Kansas Constitution provides for a homestead exemption. (This section is set forth in the appendix at page A23), and Section 60-2301 Kansas Statutes Annotated (Appendix pages A23-A24), the statutory provision for homestead, which makes the same provision as the Constitution of Kansas.

4. 12-501, 12-502, and 12-502a, Kansas Statutes Annotated, are set forth in the appendix commencing at page A26, these statutes provide for annexation of lands to a City by the extension of the boundaries thereof and provide for notice, but these statutes were not used by the City and are shown in the appendix commencing at page A26, for the purpose of informing the Court that if the City chose to use these statutes the bankrupt would have received notice and an opportunity to object to the annexation of his farm.

5. 13-1602(a) Kansas Statutes Annotated which does not provide for notice to the landowners of an extension of the City boundaries is set forth in the appendix at page A24, is the statute used by the City to annex petitioner's land.

STATEMENT OF THE CASE

The homestead claimed exempt by petitioner under the Kansas Constitution involved in this case consists of a 13.2 acre truck farm in Wyandotte County, Kansas, on which bankrupt's residence is located. (Truck farming consists of raising vegetables of all kinds and planting another crop immediately after crop is harvested so that as many as three (3) crops may be raised in a season.) The truck farm was purchased by petitioner, James George

Stafos, and his wife, Reva Stafos, as joint tenants with the right of survivorship and not as tenants in common, in 1945. (Reva Stafos is not a party to the bankruptcy proceeding.) The farm was then approximately four (4) miles West of the City limits of Kansas City, Kansas. Petitioner and his wife have continuously farmed the same since 1945 to date. The Ordinance annexing the farm homestead was passed March 1, 1966. The Ordinance annexed many other tracts and parcels of land other than that of bankrupt and his wife.

On December 29, 1970, petitioner, James George Stafos, filed his petition in voluntary bankruptcy and was adjudicated bankrupt. In his schedule, he claimed his truck farm as exempt as a homestead under Article 15, Section 9, of the Kansas Constitution and 60-2301 of Kansas Statutes Annotated. Respondent, Trustee in Bankruptcy, disallowed the homestead exemption and claimed title as Trustee to all of the Petitioner-Bankrupt's interest in the farm except one (1) acre which must include the residence of petitioner. Petitioner filed timely objections to the disallowance made by the Trustee; these objections were heard by Honorable Milton J. Sullivant, Referee in Bankruptcy, and disallowed except as to one (1) acre (Record on Appeal, page 7). Bankrupt-petitioner then filed his petition for review by the Court of the order of the Referee (Record on Appeal, page 30), and the Court affirmed the decision of the Referee in Bankruptcy (Record on Appeal, page 45). Thereafter bankrupt-petitioner filed his motion to modify the order of the Court (Record on Appeal, page 47) and his motion to vacate the judgment and requested the Court to apply the abstention doctrine and instruct the Trustee to file a declaratory judgment in the State Court as to whether or not the truck farm was exempt under the Constitution and laws of Kansas, citing *Kaiser Steel Co.* v. *W. H. Ranch Co.*, 391 U.S. 593, 88

S.Ct. 1753, 20 L.Ed.2d 835, and the cases cited in the note on the Law of Abstention in 20 L.Ed.2d 1623, both motions were overruled with the exception of Finding Number Ten and the Court's Memorandum Opinion was vacated and a new Finding Number Ten was inserted to the effect that bankrupt's land except that portion occupied by improvements has been farmed by bankrupt ever since it was purchased and is now being farmed and that the type of farming conducted by bankrupt thereon is what is known as truck farming (Record on Appeal, page 52). The bankrupt contends that the ruling of the Trial Court deprived him of his homestead rights in his 13.2 acre farm (except one acre on which he resided), without due process of law in violation of the 14th Amendment, and contrary to Article 15, Section 9, of the Kansas Constitution. Citing *Fuentes* v. *Shevin,* 407 U.S. 67, 92 S.Ct. 1983, l.c. 1997, 32 L.Ed.2d 556, wherein this Court said that the 14th Amendment's protection of "property", however, has never been interpreted to safeguard only the rights of undisputed ownership. Rather it has been read broadly to extend protection to "any significant property interest", and petitioner contends that he had a significant interest in his truck farm together with his wife who was not a party to this proceeding or to the bankruptcy proceeding and that the type of property interest vested in petitioner and his wife has been repeatedly recognized by the Supreme Court of Kansas, the Tenth Circuit Court of Appeals and the United States District Court for the District of Kansas.

The Supreme Court of Kansas held, *In re Estate of Dittemore,* 152 Kan. 574, at l.c. 577, 106 P.2d 1056, that where the homestead character has once attached to the residence of a family group it will continue so long as one of its members reside therein although deaths or separations may reduce the remainder to a single member.

The Supreme Court of Kansas in *West* v. *Grove,* 139 Kan. 361, l.c. 363, 31 P.2d 10, said that anything that the legislature might see fit to enact or did enact could in no way limit the constitutional provisions with respect to a homestead and, at l.c. 364 to 366 the Court discussed the purpose of the homestead exemption and at l.c. 366 it said: "The manner in which the homestead may be alienated is expressly stated, as are the circumstances against which the homestead right shall not prevail. It has been the settled course of the decisions of this Court to construe liberally the homestead provision and not to restrict it. The legislature lacks power to limit the provision (homestead exemption) . . ."

In *Towle* v. *Towle,* 81 Kan. 675, 107 P. 228, at l.c. 680, the Court said: "the power of the legislature over the homestead right is limited only by the Federal and State Constitutions."

In *State* v. *Mitchell,* 194 Kan. 463, 399 P.2d 556, the State attempted to padlock a homestead for a violation of the intoxicating liquor law therein. The Court held that to padlock the homestead would be alienation and in this connection defined alienation as follows: "alienated as used in the State Constitution (Article 15, Section 9), means a parting with or surrendering of some interest in the homestead", and further said that possession of the homestead constituted an interest therein, and at l.c. 465 the Court said: "It, 'the homestead' was not established for the benefit of the husband alone but for the benefit of the family and of society—to protect the family from destitution, and society from the danger of her citizens becoming paupers".

At l.c. 466 the Court further said: "It suffices to say that Kansas has zealously protected the family rights in homestead property by liberally construing the home-

stead provision in order to safeguard its humanitarian and sound social and economic purposes; and nothing less than the free consent of the resident owner of the homestead, and joint consent of husband and wife where that relation exists, will suffice to alienate the homestead, except under the specified exceptions provided in the Constitution." And the Court further stated that an incidental departure for business does not deprive it (the homestead) of its homestead character. And the Court further said: "Our Constitution limits rather than conveys power, and hence we look to it to see what it prohibits instead of what it authorizes." The homestead provision specifically enumerates the only circumstances where a homestead claimant may be deprived of his status.

In the case of *Grant, Trustee in Bankruptcy* v. *Mossman*, 384 F.2d 496, the question before the Tenth Circuit was whether or not a farm owned in co-tenancy by three brothers and operated by them as a partnership was exempt under the Kansas Constitutional provision. The Court held that it was exempt and the wives of the partners not having consented that the land should become partnership property that the homestead character was not changed.

The Referee in Bankruptcy and the Trial Court and the Court of Appeals based their decision in part on the early Kansas case of *Sarahas* v. *Fenlon*, 5 Kan. 592, decided in 1870. In that case plaintiff in error owned 17½ acres of land in the City of Wyandotte, together with an adjoining additional tract of 85½ acres outside the City. The lands in the City were owned before the adoption of the Kansas Constitution as were the lands outside the City. The plaintiff in error lived and maintained his residence on the lands outside the City. The Court held that the lands outside the City upon which he lived was his

homestead and the lands within the City were not. In other words, he could not have two homesteads, one within the City and one without the City. The question in the *Sarahas* case is not involved in the cause now before the Court for there is only one homestead claim. The Court, in the *Sarahas* case wound up its decision by stating, "at any rate he (plaintiff in error), cannot get relief in a motion to set aside the sale." In other words, no claim of homestead rights was made until after the Sheriff's Sale of the land in the City.

The Tenth Circuit in its opinion recognized that the *Sarahas* v. *Fenlon* case contained dictum and was, therefore, not directly controlling.

It is, therefore, clear from this and other cases that Article 15, Section 9, of the Kansas Constitution, is the supreme law of the State governing homestead exemptions and that the exemption cannot be taken away by legislative enactment such as 13-1602a Kansas Statutes Annotated and a City being the creature of the legislature, it cannot by ordinance alienate a homestead right in real property after the homestead right has been established, for this would be doing indirectly what the legislature could not do directly.

In the case of *Fields* v. *Anderson Cattle Co.*, 193 Kan. 558, 396 P.2d 276, it was held that a zoning ordinance of the County could not apply to the use of land for agricultural purposes, therefore, the fact that the homestead property of petitioner-bankrupt was zoned for heavy industry did not affect or alienate its use as a homestead.

In the Record on Appeal, page 23, which is page 17 of the Referee's opinion, he states that in the case of *Babcock* v. *Kansas City, Kansas,* 197 Kan. 610, 419 P.2d 883, that the ordinance annexing bankrupt's property was

passed upon by the Court in that case; the ordinances passed upon in the *Babcock* case were published between February 11, 1965, and June 4, 1965, and the ordinance annexing bankrupt's property was not enacted by the City Commission until March 1, 1966 (Appendix page A21, Record on Appeal, pages 36 and 37). The holding in the *Babcock* case is to the effect that a private individual cannot attack annexation of land to a City and that only the County Attorney or the Attorney General of the State can question annexation of lands by a City, and the Court in its opinion said:

> "Throughout the history of the jurisprudence of this state, this court has never permitted a private individual to bring an action attacking the legality of the corporate existence of a city, where the plaintiff's right to bring the action was properly challenged. Likewise, it has been uniformly held that the extension of corporate limits to include new territory, under statutory authority, is, in effect, a reorganization of the city, and an action attacking the legality of such reorganization attacks the corporate integrity of the city in the same manner as if the city's original organization were attacked. Moreover, the legality of the organization or reorganization of a city cannot be questioned in a collateral proceeding or at the suit of a private individual but must be prosecuted by the state acting through its proper officers (Topeka v. Dwyer, 70 Kan. 244, 78 Pac. 417; Railway Co. v. Lyon County, 72 Kan. 16, 84 Pac. 1031; Chaves v. Atchinson, 77 Kan. 176, 94 Pac. 624; Gardner v. Benn, 81 Kan. 442, 105 Pac. 435; Prive v. City of McPherson, 92 Kan. 82, 139 Pac. 1162; Horner v. City of Atchinson, 93 Kan. 557, 144 Pac. 1010; Mason v. Kansas City, 103 Kan. 275, 173 Pac. 535; Wellman v. City of Burr Oak, 124 Kan. 780, 262 Pac. 607;

> Smith v. City of Emporia, 168 Kan. 187, 211 P. 2d 101, 13 A.L.R. 2d 1272). The cases are legion on the point and the list of authorities is not intended to be exhaustive."

On the strength of this case bankrupt was helpless to protect his homestead rights in the property which the City Ordinance extinguished for if the County Attorney or the Attorney General did not attack the validity of the annexing ordinance, a citizen could not do so; in other words, petitioner suffered a wrong without a remedy, namely a violation of his constitutional rights under Article 15, Section 9 of the Kansas Constitution and the 14th Amendment of the Constitution of the United States.

In the case of *State ex rel. Hawkes County Attorney* v. *The City of Topeka,* 172 Kan. 745, 243 P.2d 218, it was held that G.S. 13-1602 (now appearing in Kansas Statutes Annotated) is not the exclusive method of a City operating under the commissioner form of government to annex property and that the City could annex lands if it so chose, under the method prescribed in the general law applicable to cities of any class (12-501, 12-502 and 12-502a, Kansas Statutes Annotated). It, therefore, appears that under Kansas law a city operating under a commissioner form of government has the choice of using the law that gives the landowner no right to a hearing or objection to annexation or can use the law (12-501, 12-502 and 12-502a, Kansas Statutes Annotated) which gives the owner of the property the right to notice, a hearing, and the right to appeal to the District Court of the County, as to whether or not his property should be annexed to a City.

In the case of *State ex rel. Hugh H. Kreamer, County Attorney* v. *City of Overland Park, Kansas,* 192 Kan.

654, 391 P.2d 128, it was held that "an action challenging the validity of a city annexation ordinance can be prosecuted only by the state acting through one of its officers such as the County Attorney or the Attorney General", citing *Lampe* v. *City of Leawood*, 170 Kan. 251, 225 P. 2d 73.

FEDERAL CASES CONSTRUING THE HOMESTEAD EXEMPTION WHERE THE HOMESTEAD CAN ONLY BE ALIENATED BY THE JOINT CONSENT OF HUSBAND AND WIFE WHERE THAT RELATION EXISTS

In the case of *Jones* v. *Kemp, et al.*, 144 F.2d 478 (10th Cir. 1944), the Oklahoma Constitutional homestead provision was similar to the Kansas provision in that a homestead can be alienated only by the joint consent of husband and wife where that relation exists and the Court held that in Oklahoma a homestead right is a creature of the Constitution and Statutes and, although not an estate, it is a special and peculiar interest in land belonging to husband and wife jointly and indivisibly and that neither husband or wife may be divested of his or her interest in the homestead without the consent of both; and that the wife's interest in the homestead being an indivisible and vested interest cannot be subject to levy and sale for Federal and State taxes assessed against the husband.

In *Bigley* v. *Jones, Collector of Internal Revenue*, 64 F. Supp. 389 (D.C. Okla.), the Court held that the wife's homestead rights under Oklahoma law is an indi-

visible and vested interest in homestead property and not subject to payment of income taxes to the government assessed against the husband.

In *Hammon* v. *Sommer,* 10 F. 601 (C.C. Kan., 1882), the Circuit Court held that a husband, after the death of his wife, could alienate his interest in the homestead absolutely or by mortgage, but the rights of occupancy by the minor children would not be affected thereby. In other words, such a mortgage was a valid lien upon the interest of the husband subject to the rights of occupancy as a homestead by the children born of the marriage of the husband and wife.

In *U. S.* v. *Hersberger,* 338 F.2d 804 (D.C. Kan., 1972), the Court held that property occupied by husband and wife and owned by them jointly could be claimed as a homestead by the wife and that the wife could assert homestead rights in the property and precluded a foreclosure of Federal tax liens against the husband upon the property. From the above cited Federal cases, we see that the Federal Courts in this Circuit have recognized the right of the wife to claim a homestead interest in property occupied by the family and claimed exempt as a homestead in Kansas and Oklahoma. The petitioner contends that the decision of the Court of Appeals is in conflict with the holdings of these Federal cases and the holdings of the Supreme Court of Kansas on the same question, and the holdings of this Court construing 14th Amendment rights in property.

THE DECISIONS OF THE DISTRICT COURT AND THE COURT OF APPEALS WERE CLEARLY ERRONEOUS IN THE APPLICATION OF THE KANSAS CONSTITUTIONAL PROVISION REGARDING HOMESTEAD EXEMPTIONS AND THE APPLICATION OF FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES TO PROPERTY RIGHTS TO THE FACTS IN THIS CAUSE

General Order In Bankruptcy Number 36 provides that except as regulated by the Bankruptcy Act appeals shall be governed by the rules in civil actions including the Rules of Civil Actions in the Courts of the United States.

Section 24, of the Bankruptcy Act (11 U.S.C. 47), provides that the Courts of Appeals are invested with appellate jurisdiction from Courts of Bankruptcy in controversies arising in bankruptcy proceedings and that such jurisdiction shall be exercised by appeal and further provides that the Supreme Court of the United States is vested with jurisdiction to review judgments, decrees and orders of the Courts of Appeals in accordance with the provisions of the laws of the United States.

General Order In Bankruptcy Number 47 provides that the Judge shall accept the findings of the Referee in Bankruptcy unless clearly erroneous. Rule 52 of the Rules of Civil Procedure provides that findings of fact shall not be set aside unless clearly erroneous. It is the contention of petitioner that the findings of fact both of the Referee In Bankruptcy and the District Court and the decision and judgment of the Court of Appeals were clearly erroneous in that there was a stipulation filed with the Court as to the occupancy as a homestead by petitioner and his wife of the 13.2 acre farm from the time of purchase to and

after the filing of the bankruptcy proceeding and the adjudication in bankruptcy of petitioner. This stipulation is set forth in the appendix at page A22. The testimony of petitioner-bankrupt was uncontradicted, it clearly showed that the farm was a homestead (Transcript of July 19, 1972). The question in this appeal was one of law, that is, whether the annexation of petitioner's farm by the City extinguished and alienated his interest therein as a homestead. On the strength of the Kansas and Federal cases cited in this petition, petitioner submits that the decision of the Trial Court and the Court of Appeals misapplied the law and the constitutional provisions of Kansas concerning homesteads and the 14th Amendment of the Constitution of the United States as to property rights of petitioner in his homestead on the strength of the authorities heretofore cited in this petition. Furthermore petitioner contends that since there are no Kansas cases passing squarely on the question to the effect of annexation by a City on a homestead of more than one acre of land, the Court should have applied the abstention doctrine and instructed the Trustee to litigate the question of homestead exemption in the State Court or have reversed the judgment of the Trial Court as erroneously applying the law to the facts in the case. In this connection we wish to call the Court's attention to: *U. S.* v. *U. S. Gypsum Co.*, 68 S.Ct. 525, 333 U.S. 364, 92 L.Ed. 92, rehearing denied, 68 S.Ct. 788, 333 U.S. 869, 92 L.Ed. 1147, wherein it was held that a finding is clearly erroneous when although there is evidence to support it, the reviewing Court on entire evidence is left with a definite and firm conviction that a mistake has been committed and it was further held that the findings of a Trial Court do not have the statutory or constitutional limitations of findings of administrative agencies or of a jury and that the Supreme Court may reverse findings of fact by Trial Courts where clearly er-

roneous. In the case of *Manning* v. *M/V,* (C.A. Fla., 1969) 417 F.2d 603, it was held that the clearly erroneous rule does not apply to facts or legal conclusions induced by an erroneous legal standard in the Trial Court and in *MacMullen* v. *South Carolina Electric and Gas Co.,* (C.A. So. Car., 1963) 312 F.2d 662, certiorari denied, 83 S.Ct. 1302, 373 U.S. 912, 10 L.Ed.2d 413, it was held that the clearly erroneous rule is subject to exception and modification in the interest of justice.

In *U. S.* v. *Mississippi Valley Generating Co.,* 81 S.Ct. 294, 297, 364 U.S. 520, 526, 5 L.Ed.2d 268, it was held that the clearly erroneous restriction is not applicable to the Trial Court's rulings on questions of law. See also *U. S.* v. *Wholesale Oil Co.,* (10th Cir., 1946) 154 F.2d 745. Both of the foregoing cases are cited in 9 Wright and Miller, Federal Practice and Procedure, Section 2588, dealing with conclusions of law and Section 2589, dealing with mixed questions of fact and law.

It is the contention of petitioner that there is little, if any, question in this case regarding the fact that the truck farm was the homestead of petitioner and that he had property rights taken away from him without due process of law in violation of the 14th Amendment to the Constitution of the United States.

At page 9 of Appellant's brief, he stated, "but bankrupt contends that the Trial Court's ruling deprived him of his homestead right without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, in that prior to the passage of the Ordinance bankrupt and his wife, who were the owners of said property, as joint tenants with the right of survivorship and not as tenants in common, had a vested interest in and to said homestead as and for homestead purposes,

within the meaning of the Constitution of the State of Kansas." * * *

"In the recent case of *Fuentes* v. *Shevin*, 407 U.S. 67, 92 S.Ct. 1983 at l.c. 1997, the Court said:

> 'The Fourteenth Amendment's protection of "property", however, has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to "any significant property interest," Boddie v. Connecticut, supra, 401 U.S., at 379, 91 S.Ct., at 786, including statutory entitlements. See Bell v. Burson, supra, 402 U.S., at 539, 91 S.Ct. at 1589; Goldberg v. Kelly, supra, 397 U.S., at 262, 90 S.Ct. at 1017.'"

In Appellant's reply brief, it was stated: "The Referee (Rec. Vol. 4, p. 13) apparently did not think the Fourteenth Amendment was applicable for his statement is:

> 'The bankruptcy court in determining the exemptions allowed by states is bound by the state law as interpreted by the highest judicial tribunal of the state.'

This may be another reason as to why the Fourteenth Amendment was not mentioned in the Referee's opinion in reference to the bankrupt's right not to have his homestead diminished without a remedy."

In Bankrupt's Petition for Rehearing, at page 1, he stated: "At page 9 of Appellant's Brief, he contends that the Trial Court's ruling affirming the decision of the Referee in Bankruptcy deprived him of his homestead rights in 12.2 acres of the 13.2 acre truck farm owned by Bankrupt and his wife as joint tenants and not as tenants in common without due process of law in violation of the 14th Amendment to the Constitution of the United States.

Instead of citing a dragnet of cases to the effect that property rights are protected by the 14th Amendment, Appellant cited the most recent cases dealing with property rights under the 14th Amendment, namely, *Fuentes* v. *Shevin*, 92 S.Ct. 1983, 407 U.S. 67, 32 L.Ed.2d 556, rehearing denied, 93 S.Ct. 180, to the effect that the 14th Amendment's protection of property, however, has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to "any significant property interest"." * * *

In the Majority Opinion of the Court of Appeals, it was stated, at page 7, "He (petitioner) contends that a farming homestead is exempt from forced sale under any process of law and cannot be alienated without the joint consent of husband and wife even though it was annexed to the City without depriving him of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States." And Judge Murrah, in his Special Concurring Opinion, concludes by saying, "beyond stating the point there is no argument in the brief on the due process question and I will leave it there." These statements of the Court of Appeals are incorrect for in oral argument and in Appellant's Brief, his Reply Brief and his Petition for Rehearing, it is clear that Petitioner-Bankrupt, the Appellant in the Court of Appeals, clearly claimed that he had a vested homestead interest in his farm and that the vested homestead interest was alienated and he was deprived thereof without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. Therefore, the violation of petitioner's 14th Amendment rights were clearly raised.

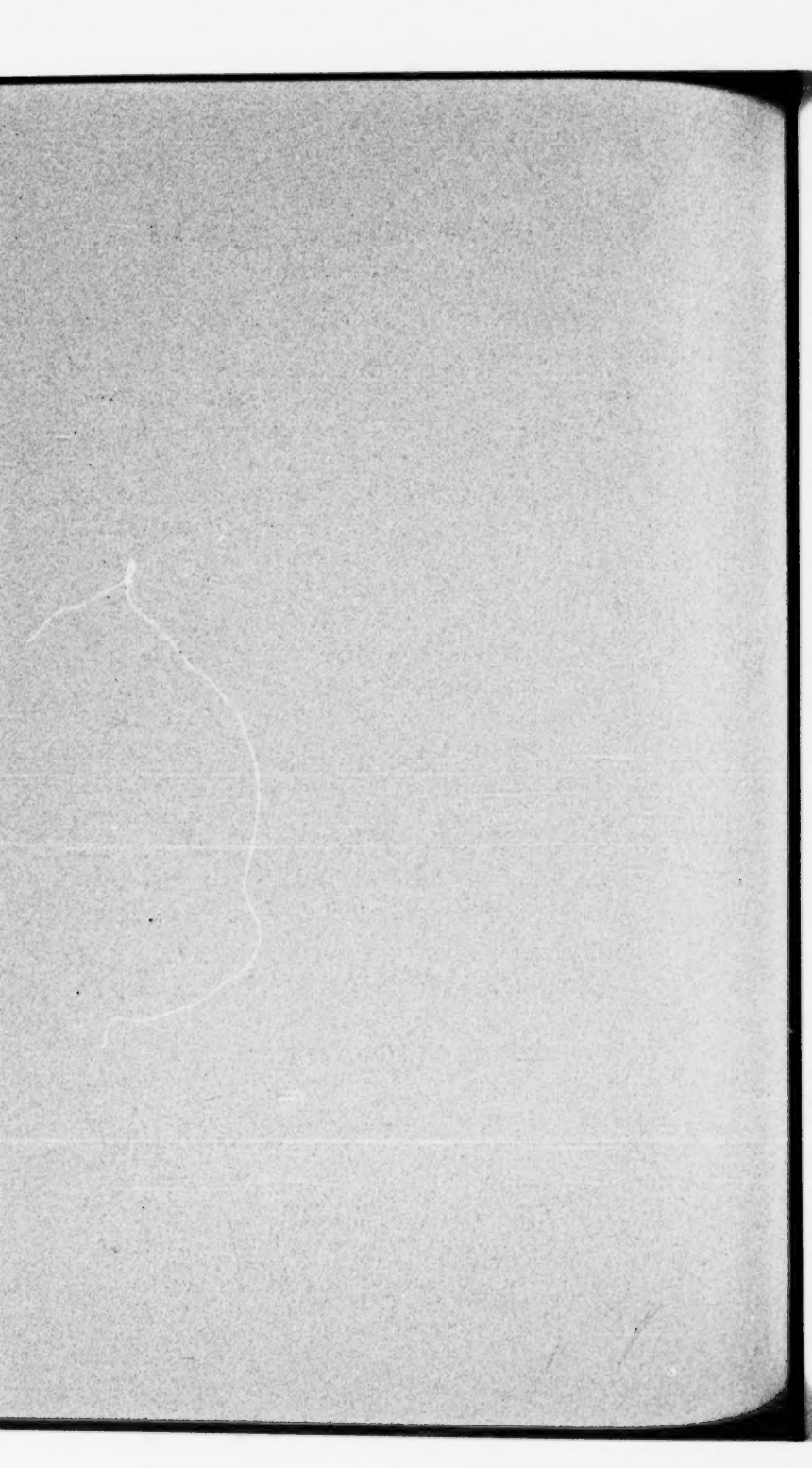
CONCLUSION

It is the contention of petitioner that the District Court and the Court of Appeals have erroneously applied the Kansas Constitutional provisions providing for homestead exemptions and the decisions of the Kansas Supreme Court to the question of law as to whether or not the annexation of petitioner's 13.2 acre farm extinguished and alienated petitioner's interest in his farm as a homestead save and except one acre upon which the residence of petitioner and his wife is located leading the Trial Court to affirm an erroneous decision of the Referee denying petitioner's right to the whole of the 13.2 acre farm set over to petitioner as exempt in accordance with the provisions of the Bankruptcy Act concerning exemptions to a resident of the State of Kansas under the Kansas Constitutional provisions and the decision of the Supreme Court of Kansas and of the Federal Courts construing said Constitutional provision in violation of bankrupt's 14th Amendment rights under the Constitution of the United States. That for the reasons set forth in this petition that a Writ of Certiorari should issue to review the opinion and judgment of the Tenth Circuit Court of Appeals.

Respectfully submitted,

WASH H. BROWN
THOMAS E. JOYCE
428 Brotherhood Building
Kansas City, Kansas 66101
Attorneys for Petitioner

APPENDIX



OPINION OF THE COURT OF APPEALS

(Filed April 30, 1973)

Before MURRAH, SETH and BARRETT, Circuit Judges.

BARRETT, Circuit Judge.

James George Stafos filed a voluntary petition in bankruptcy on December 24, 1970, listing unsecured debts of $612,132.06 which he had incurred as a self-employed broker-distributor and packager of truck farming produce. He claimed as exempt homestead property, inter alia, a 13.2 acre tract of land in Wyandotte County, Kansas, acquired by him and his wife, Reva, who is not a party to this proceeding, in 1945 as joint tenants, with right of survivorship. Stafos, his wife and children have continually resided on the property since 1945. In his petition, Stafos estimated the value of the property at $35,000.00. With some minor exceptions, the property has been *used* as the family home and for farm crop income. Reva Stafos has been actively engaged in the farm operations on the acreage and some 60 acres of adjacent leased acreage. Stafos testified that they did about $200,000.00 "worth of business" from the farming operation in 1971.

Stafos relied upon the provisions of Article 15, § 9 of the Kansas Constitution[1] and K.S.A. § 60-2301 in support

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1. Article 15, § 9 provides in pertinent part:

A homestead to the extent of one hundred and sixty acres of farming land, or of one acre within the limits of an incorporated town or city, occupied as a residence by the family of the owner, together with all the improvements on the same, shall be exempted from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife, when that relation exists; but no property shall be exempt from sale for taxes, or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon: *Provided,* The provisions of this section shall not apply to any process of law obtained by virtue of a lien given by the consent of both husband and wife: . . .

of his contention that the entire 13.2 acres is exempt. The language contained in the above cited statute is identical to the language contained in Article 15, § 9. Until March 1, 1966, the acreage was located outside the limits of any incorporated city or town. On that date, by ordinance enacted in accordance with the then applicable law, the 13.2 acres was annexed to the city of Kansas City, Kansas. Neither Stafos nor his wife consented to the annexation, nor is there any evidence that they were movants in respect thereto. No portion of the acreage has been platted.

The Trustee in Bankruptcy filed his report on March 4, 1971, allowing Stafos one acre to be set aside as his exempt homestead, which is to include his family home out of the total 13.2 acres, value unknown. Stafos objected and a hearing was held before the Referee in Bankruptcy on March 18, 1971. One Rex Vickers, a real estate expert, testified that on that date the Stafos acreage was part of the "Muncie Industrial Area" zoned "J" for heavy industry and that considerable industry had already located in the immediate vicinity. He further testified that part of the Stafos acreage had been previously used as an office building constructed by Miller Construction Company, now occupied and used as a salvage yard at a monthly rental to Stafos of $140.00. He also testified with respect to a building used by Fouts Trucking Company. In his expert opinion "the whole area there gives the complexion of an industrial site and an industrial area; not a farm." He would not classify the acreage as rural land, but rather as urban industrial land of a minimum value of $10,000.00 per acre. He did acknowledge that when he viewed the acreage the only major visible *use* being made thereof was farming. Harry Duckers, County Agricultural Agent, testified that the Stafos' have continually farmed the land since 1948.

On January 24, 1972, the Referee filed his Order, with detailed findings and conclusions, approving the Trustee's Report and denying Stafos' objection. From that Order Stafos filed his petition for review before the presiding United States District Judge, Honorable Earl E. O'Connor. The Court entered its Order on May 19, 1972, fully adopting the Referee's findings and conclusions. It held that annexation reduced Stafos' homestead to one acre. It is from that Order that this appeal is taken.

Stafos contends here, as he did below, that the federal courts should abstain because the homestead exemption issue decided in In The Matter of James George Stafos, Bankrupt, ... F.Supp. ..... (D.Kan. 1972), has not been decided by the Kansas state courts and that the Kansas courts are the best judges of the Kansas Constitution. We have no argument with these contentions, per se. 11 U.S.C.A. § 24 allows bankrupts the exemptions prescribed by state laws at the date of filing. In Re Cummings, 413 F.2d 1281 (10th Cir. 1969), cert. denied 397 U.S. 915 (1970). While a state procedure in the nature of a Declaratory Judgment action was available to the Trustee after Stafos filed his homestead claim (K.S.A. § 60-1701, et seq.), this does not detract from the fact that the federal district court had exclusive jurisdiction of the subject matter. In Re Cummings, *supra;* Texaco, Inc. v. Pruitt, 396 F.2d 237 (10th Cir. 1968). While dictum and therefore not directly controlling, we note that the following language from Sarahas v. Fenlon, 5 Kan. 592 (1870) has not been repudiated by subsequent Kansas decisions:

> [H]e [the owner] could hold but one acre as a homestead, exempt from execution, no matter whether it was worth $10 or $10,000, or whether it was used for farming purposes or was covered all over with palatial residences. One acre is all that is exempt as a homestead

> under the Constitution. If he lived on that part in the city, that acre would be his homestead, and the residue of the city property, as well as his land in the country, would be subject to forced sale under execution. This is the plain letter of the Constitution; . . . 5 Kan. 592 at 596.

The decision of the federal trial court as to the law of the state where he is sitting will be accepted on appeal unless clearly erroneous. Industrial Indemnity Company v. Continental Casualty Company, 375 F.2d 183 (10th Cir. 1967). Certainly Sarahas v. Fenlon, *supra,* weighs heavily in favor of the trial court's application of Kansas law. One court has held that in the absence of ascertainable state court interpretation, the bankruptcy court must construe the statute and determine its application. Doethlaff v. Penn. Mut. Life Ins. Co., 117 F.2d 582 (6th Cir. 1941), cert. denied 313 U.S. 579 (1941). In addition, the rights of creditors have been held in "limbo" awaiting resolution of this exemption issue for more than two years. This case does not present all of those "special circumstances" dictating the imposition of abstention as in Kaiser Steel Corp. v. W. S. Ranch Co., 391 U.S. 593 (1968), Baggett v. Bullitt, 377 U.S. 360 (1964), and Meredith v. Winter Haven, 320 U.S. 228 (1943).

Stafos alleges that the trial court erred, as a matter of law, in adopting the findings and conclusions of the Referee. He contends that a farming homestead is exempt from forced sale under any process of law and cannot be alienated without the joint consent of husband and wife even though it was annexed to the City without depriving him of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. He alleges that he had a vested interest in the 13.2 acres as a *farming land* homestead within the meaning of the Kansas

Constitution prior to the passage of the City Ordinance incorporating the 13.2 acres because he and his wife owned the property as joint tenants.

The test of our review is prescribed under Rule 52, Fed.R.Civ.P., as required by 11 U.S.C.A. § 47(b) and Bankruptcy Gen. Order 36, 28 U.S.C.A., which specifically provide that the United States Courts of Appeal shall exercise appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in the form and manner of an appeal in civil actions, including Rules of Civil Procedure for the District Courts.

> The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether "on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed." Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969).

The same rule applies in cases involving constitutional rights. Williams v. Eaton, 468 F.2d 1079 (10th Cir. 1972). If a trial court adopts a referee's findings and conclusions, they are thereby adopted and approved as its own. Earhart v. Callan, 221 F.2d 160 (9th Cir. 1955), cert. denied 350 U.S. 829 (1955). Under Bankruptcy General Order 47, 28 U.S.C.A., the Trial Court is bound to accept the Referee's findings of fact unless they are clearly erroneous. Moran Bros., Inc. v. Yinger, 323 F.2d 699 (10th Cir. 1963). The "clearly erroneous" rule does not apply on questions of law or on mixed questions of fact and law. See cases cited in 9 Wright & Miller, Federal Practice and Procedure: Civil §§ 2588, 2589; Wright, Law of Federal Courts, 2nd Ed., § 96. However, in our Circuit it is settled law that the views of a Federal District Judge, who is a resident of the state where the controversy arose in a case involving

interpretations of the law of that state, carry extraordinary persuasive force on appeal, if the Court of Appeals is not aided in its consideration by either administrative interpretation or judicial expression from state courts. Hardberger and Smylie v. Employers Mutual Liability Insurance Company of Wisconsin, 444 F.2d 1318 (10th Cir. 1971); Hamblin v. Mountain States Telephone and Telegraph Company, 271 F.2d 562 (10th Cir. 1959); Bradshaw v. Superior Oil Co., 164 F.2d 165 (10th Cir. 1947).

The Referee and the Trial Court relied on the weight of case authority in limiting Stafos to a one-acre homestead exemption which must include the "home" or "residence" of the family, by specific reference to the general rule set forth in 40 C.J.S. *Homesteads* § 58:

> While there is authority to the contrary, in most jurisdictions where the question has been raised it has been held that, even without the owner's consent and against his wishes, the limits of a city, town, or village may be extended so as to include what was formerly a rural homestead and to afford the owner only the amount available as an urban homestead. Where the mere fact that land lies within the boundaries of the city, town, or village, is not regarded as necessarily stamping it with the character of urban property for homestead purposes, as discussed supra § 53, it is necessary, in order that the owner shall lose the right to a rural homestead and be restricted to the right of an urban homestead, that the land, in addition to being embraced within the extended municipal limits, shall be otherwise actually impressed with an urban character. . . .

We specifically concur with the findings of the Referee and Trial Court that although the Stafos acreage remains

unplatted, that neither the Kansas Constitution nor statutes require that the land incorporated be platted or laid out for urban purposes in order to be impressed with urban character. There is substantial evidence supporting the finding that the character of the Stafos acreage is urban and that his homestead should be limited to one acre after annexation. Nothing expressed in the Kansas Constitution, Article 15, § 9, K.S.A. § 60-2301, or the Kansas decisions which we have reviewed in detail convince us that the trial court committed error. United States v. Jones, 229 F.2d 84 (10th Cir. 1955).

AFFIRMED.

No. 72-1495

MURRAH, Circuit Judge, concurring specially:

I readily concur in the ultimate result reached in this case but I am unable to agree with the reasoning by which my brethren reached that result. In my view the lawsuit is more simply stated and decided, and I am, therefore, constrained to briefly state my views.

When the bankrupt acquired his 13.2 acres of land, it was outside the city limits of Wyandotte, Kansas. He was living on the land as his homestead and truck farm when it was annexed and brought within the city limits, and was so using it when this proceeding was commenced, although the land had been zoned for urban industrial use. He claimed all of the 13.2 acres as his homestead exemption. The referee and the trial court allowed only one acre under the provisions of the Kansas constitution and statute, which provide that "[a] homestead to the extent of one hundred sixty acres of farming land, or of one acre within the limits of an incorporated town or city, occupied as a residence by the family of the owner, together with all the improvements on the same, shall

be exempted from forced sale under any process of law, ..."

In his brief the bankrupt concedes that the referee correctly stated the question involved, as follows: "Did the extension of the city limits, annexation and incorporation of the entire tract of 13.2 acres into the city of Kansas City, Kansas, subsequent to the ownership and occupancy of the entire tract as a homestead by the bankrupt and his family outside the limits of an incorporated town or city, limit the homestead exemption to one acre?" The bankrupt answers that the extension of the city limits to include his homestead did not operate to "eliminate" or "alienate" his homestead rights in the 13.2 acres. His argument is not entirely clear, but, as we read it, it is twofold: (1) the land continued to be occupied and used for farming purposes, and was, therefore, exempt as farming land, although incorporated within the city limits and zoned for urban industrial use; and (2) any other construction of the Kansas constitution and laws would operate to deny him Fourteenth Amendment due process.

Indisputably the bankrupt is entitled to claim a homestead exemption prescribed by the law of the State of Kansas, but the power of the city to annex the property, even without the consent of the owner, is unquestioned. The question is, as the referee stated, whether inclusion in the city limits can be said to reduce the quantity of the homestead rights from 13.2 acres to one acre. As thus reduced the homestead admittedly remains inviolate.

The homestead provisions of the Kansas constitution and statutes came on for consideration before the Supreme Court of Kansas about one hundred years ago in Saharas v. Fenlon. In that case the lands claimed as a homestead exemption were partly within and partly without incor-

porated city limits. The lands within the city limits were sold on execution, and the question reaching the Supreme Court was whether the husband-wife owners could claim the city property as their homestead exemption. The Supreme Court held that they could not claim any of the city property as their homestead, simply because they did not live on it. But the court did not stop there. It went on to say that "even if the claimant lived on that part of the land within the city, he could hold but one acre as a homestead, exempt from execution, no matter whether it was worth $10 or $10,000, or whether it was used for farming purposes or was covered all over with a palatial residence. One acre is all that is exempt as a homestead under the constitution. If he lived on that part in the city, that acre would be his homestead, and the residue of the city property as well as his land in the country would be subject to forced sale under execution. This is the plain letter of the constitution; it cannot be enlarged by construction or made plainer by argument." As far as we can find this unequivocal dictum has never been repudiated or challenged in any court since its pronouncement.

After canvassing the legal effect of the use to which the land was put on the quantity of the exemption, the referee finally concluded that regardless of the value, the use or the zoning classification, the Kansas constitution controlled, and that it meant just what it said, to wit: Since at the time of bankruptcy the 13.2 acres were within the limits of an incorporated city, only one acre was exempt as a homestead. I agree that the mandate of the constitution is too clear for mistake or debate. In this view there is no justification whatsoever for abstention. This is a *Meredith* case, not a *Kaiser Steel* case. But even if there was any room for interpretation the word of the Kansas judge, recently of the Supreme Court of

that State, is quite good enough for me. *See* United States v. Hershberger, No. 72-1416 (10th Cir. filed Mar. 13, 1973). Beyond stating the point there is no argument in the brief on the due process question and I will leave it there.

PETITION FOR REHEARING

Comes now the Appellant, James George Stafos, by Wash H. Brown and Thomas E. Joyce, his attorneys, and respectfully moves the Court for an order granting a rehearing in this appeal for the following reasons: This appeal involves an important interpretation of Article 15, Section 9, of the Constitution of the State of Kansas, providing for homestead exemptions in said State which was not dealt with in this Court's opinion.

At page 9 of Appellant's Brief, he contends that the trial Court's ruling affirming the decision of the Referee in Bankruptcy deprived him of his homestead rights in 12.2 acres of the 13.2 acre truck farm owned by Bankrupt and his wife as joint tenants and not as tenants in common without due process of law in violation of the 14th Amendment to the Constitution of the United States. Instead of citing a dragnet of cases to the effect that property rights are protected by the 14th Amendment, Appellant cited the most recent case dealing with property rights under the 14th Amendment, namely, Fuentes vs. Sheven, 92 S. Ct. 1983, 407 U.S. 67, 32 L. Ed. 556, rehearing denied 93 S. Ct. 180, to the effect that the 14th Amendment's protection of property, however, has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to "any significant property interest", Bodie vs. Conn., 401 U.S. at 379, 91 S. Ct. at 786, including Stat-

utory Enactments. See Bell vs. Burson, 402 U.S. at 539, 91 S. Ct. at 1589; Goldberg vs. Kelly, 397 U.S. at 262, 90 S. Ct. at 1017, with the citation of this case and the calling of the Court's attention that the trial Court's ruling deprived bankrupt of his homestead rights without due process of law in violation of the 14th Amendment, Appellant feels that the issue as to his deprivation of property (his homestead interest in the whole of the 13.2 acre tract) contrary to the 14th Amendment was fully raised. Before arguing the effect of the Kansas Exemption Constitutional Provision on Federal Law and the decisions of the Federal Courts on the subject, we first wish to call the Court's attention to the Kansas decisions.

The Kansas Supreme Court in West vs. Grove, 139 Kan. 361, 31 P. 2d 10, held that "the general exemption laws of the State are those provisions included in R.S. 60-3501 to 60-3509, inclusive." "Those statutes may be said to be "exemption laws of this State", but anything that the legislature might see fit to enact or did enact could in no way limit the constitutional provisions with respect to a homestead." It, therefore, appears that Article 15, Section 9, of the Kansas Constitution is the Supreme Law of the State governing homestead exemptions and that the exemption cannot be taken away by legislation or City Ordinance without the consent of husband and wife where that relation exists.

In Towle vs. Towle, 81 Ks. 675, 107 P. 28, the Court held that the power of the Legislature over the homestead right is limited only by the Federal and State Constitutions.

In State vs. Mitchell, 194 Ks. 463, 399 P. 2d 556, the Court stated that the word "alienate" as used in Article 15, Section 9, of the Kansas Constitution, means "a parting with or surrendering of some interest in the homestead." and as early as Morris vs. Ward, 5 Ks. 239, the Supreme Court said: "The possession of the homestead is an ac-

quired interest," and at page 466 in State vs. Mitchell said: "It suffices to say that Kansas has zealously protected the family rights in homestead property by liberally construing the homestead provisions in order to safeguard its humanitarian and soundly social and economic purposes; and nothing less than the free consent of the resident owners of the homestead, and joint consent of husband and wife where that relation exists, will suffice to alienate the homestead except under the specified exceptions provided in the constitution" and in the case of In Re Estate of Dittemore, 152 Ks. 474, 106 P. 2d 1056, at l.c. 577, the Court said: "Where the homestead character has once attached to the residents of the family group, it will continue so long as one of its number reside therein." In the early case of Helm vs. Helm, 11 Ks. 19 (Reprint Page 25), decided in 1873, Chief Justice Kingman, at page 21 (Reprint Page 27), said: "Our homestead provision is peculiar. The homestead cannot be alienated without the joint consent of the husband and wife. The wife's interest is an existing one. The occupation and enjoyment of the estate is secured to her against any act of her husband, or creditors, without her consent. The law has set this property apart as her home. It may be difficult to define the estate but it is one nevertheless. The wife's right under our homestead laws is an existing interest, probably none will deny." See also Jewett and Co. vs. McKrie, 36 Ks. 636, 14 Pac. 257.

This Court in its opinion relied on Sarahas vs. Fenlon, 5 Ks. 592 (Reprint Page 360), this case is not in point for it involves an irregular tract of land bounded by 10 lines forming all right angles 17¼ acres of which was in the City, and 85½ outside of the City upon which tract the residence was located. John Sarahas owned the entire tract within and without the City prior to the adoption of the Kansas Constitution. Execution on a judgment

rendered against him was issued and the lands within the City were levied upon and sold to Thomas P. Fenlon and thereafter John Sarahas moved to set aside the execution sale, apparently he did not do anything until after the land was sold, and the Court concludes its opinion by stating: "at any rate he cannot get relief on a motion to set aside a sale." Which implies that the proper remedy was to file a motion to quash the execution prior to sale, which he failed to do. The part of the opinion relied upon by this Court in deciding the appeal in this case is dictim and this Court acknowledges that it was. The earliest Federal case the writers can find dealing with Kansas homestead exemption is Hammon vs. Sommer, 10 Fed. 601, (CC. Ks. 1882), wherein the Circuit Court held that a husband after the death of his wife could alienate his interest in the homestead absolutely or by mortgage, but the rights of occupancy by the minor children will not be affected thereby. Such a mortgage is a valid lien upon the interest of the husband subject to the rights of occupancy and the homestead rights of the heirs.

The rights of a wife or children under the Kansas homestead provisions of its constitution is an interest which cannot be alienated even for an indebtedness to the Federal Government for taxes assessed against the husband where the relation of the husband and wife exists. Oklahoma has a provision in its Constitution similar to that of Kansas Constitution in that a homestead can be alienated only by the joint consent of husband and wife where that relation exists and the Tenth Circuit in Jones vs. Kemp, et al., 144 F. 2d 478, held that in Oklahoma a homestead right is a creature of the Constitution and statutes and, although not an estate, it is a special and peculiar interest in land belonging to husband and wife jointly and indivisibly. And that neither husband or wife may be devested of his or her interests in the homestead without

the consent of both and that the wife's interest in the homestead being an indivisible and vested interest cannot be subjected to levy and sale for satisfaction of Federal tax liability of the husband.

This case was followed in Bigley vs. Jones, Collector of Internal Revenue, 64 Fed. Supp. 389, wherein the Court held that the wife's homestead rights which under Oklahoma law is an indivisible and vested interest in homestead property is not subject to sale for payment of income taxes due the government from her husband. In U. S. vs. Hershberger, 338 Fed. Supp. 804, (D.C. Ks. 1972), the Court held that property occupied by husband and wife, and owned by them jointly as tenants could be claimed as homestead by wife who claimed to be the head of the household and that the wife could assert homestead rights in the property and preclude foreclosure of Federal Tax Liens against the interest of the husband in the property.

In these tax cases the Federal Courts recognize that there is an indivisible and vested property interest in a homestead of husband and wife and that the homestead property is not subject to sale for taxes due and owing by the husband. The homestead of Appellant now before the Court was established prior to its annexation by the City, it, therefore, follows that the homestead interests of the bankrupt and/or his wife were not alienated by the passage of a City Ordinance without notice and without an opportunity to be heard for there was no consent of husband and wife to the annexation of their property into the City, therefore, their vested property rights in the homestead were not extinguished by annexation and the area of their truck farm reduced from 13.2 acres to 1 acre, of their established homestead without due process of law. The Federal Courts trial, appellate and supreme

have decided many cases under the 14th Amendment and as heretofore stated appellant elected not to cite a dragnet of these cases but rely on the last decision of the Supreme Court in Funtes vs. Shevin decided June 12, 1972, to the effect that the 14th Amendment extends to any significant property interest.

To permit the opinion in this appeal to stand would subject every farmer whose farm borders or is in close proximity to a first class City to loose their existing homestead interest in their land; and reduce their homestead interest to one acre when the governing body of a first class City by the passage of an Ordinance extending the boundaries of the City without notice of any kind, and the laws of Kansas require no notice and provide for no hearing of landowners in the case of first class Cities (but does require notice to landowners and a provision for objecting to annexation in the case of second and third class Cities). It is the contention of appellant that their homestead interest was a vested one and that since no remedy is provided by the laws of Kansas, that they have been deprived of their homestead interest in their land as a truck farm by the reduction in acreage from 13.2 acres to one acre of land.

CONCLUSION

It is respectfully submitted that a rehearing should be granted in this cause and the original opinion vacated and reargument of the cause permitted.

Respectfully submitted,

Wash H. Brown and Thomas E. Joyce
By: Thomas E. Joyce
Attorney for Appellant

ORDER

MAY TERM—MAY 31, 1973

Before Honorable Alfred P. Murrah, Honorable Oliver Seth and Honorable James E. Barrett, Circuit Judges

This matter comes on for consideration of the Petition for Rehearing filed by the Appellants in the captioned case.

Upon consideration whereof, the Petition for Rehearing is denied.

/s/ Howard K. Phillips
Clerk

LETTER FROM CLERK

UNITED STATES COURT OF APPEALS
Tenth Circuit
Office of the Clerk
Denver, Colorado 80202

Howard K. Phillips
Clerk

Telephone
303-837-3157

June 8, 1973

Mr. Arthur G. Johnson, Clerk
United States District Court
Federal Building
Kansas City, Kansas 66601

Re: No. 72-1495, In the Matter of James George Stafos v. Laurence M. Jarvis, etc. (District Court No. 21239-B-4)

Dear Mr. Johnson:

In accordance with Rule 41 of the Federal Rules of Appellate Procedure, effective July 1, 1968, I am enclos-

ing a certified copy of the judgment and a copy of the opinion, which shall constitute the mandate of this Court. You will please file this mandate in the records of your court immediately upon receipt of it by direction of this Court. I am also enclosing a form of receipt for you to sign and return to this office.

The original record on appeal will be returned to you at a later date.

Very truly yours,

/s/ Howard K. Phillips,
Clerk

HKP/li

Enclosures

cc: Thomas E. Joyce and Wash H. Brown, Esquires, Attorneys at Law, 428 Brotherhood Building, Kansas City, Kansas 66101

Gerald T. Elliott and Robert M. Kaplan, Esquires, Attorneys at Law, Floor Seven, Huron Building, Kansas City, Kansas 66101

Mr. Laurence M. Jarvis, Trustee in Bankruptcy, 3115 Strong Avenue, Kansas City, Kansas 66101

JUDGMENT

(Filed June 8, 1973)

MARCH TERM—APRIL 30, 1973

Before Honorable Alfred P. Murrah, Senior Circuit Judge, Honorable Oliver Seth and Honorable James E. Barrett, Circuit Judges

This cause came on to be heard on the record on appeal from the United States District Court for the DISTRICT OF KANSAS, and was argued by counsel.

On consideration whereof, it is ordered that the judgment of said court is AFFIRMED; MURRAH, Senior Circuit Judge, concurring.

Howard K. Phillips,
Clerk
By: /s/ Lavon M. Irlbeck
Deputy Clerk

MEMORANDUM OPINION

(Filed May 19, 1972)

Bankrupt has petitioned for review of the referee's order of January 24, 1972, denying his claim to a rural, as opposed to urban, homestead. The pertinent facts, as determined in substance by the referee, are as follows:

1. Bankrupt Stafos and his wife acquired title as joint tenants with right of survivorship by warranty deed to 13.2 acres of land located in Wyandotte County, Kansas, on November 23, 1945.

2. Since purchase of the land, the Stafos have continuously resided on it with their family as a homestead.

3. When the land was purchased in 1945, it was outside the corporate limits of any town or city.

4. On March 1, 1966, by Ordinance No. 45492, the city of Kansas City, Kansas, annexed the land in question as part of the city.

5. On December 24, 1970, James George Stafos filed a voluntary petition in Bankruptcy, claiming 13.2 acres as his homestead exemption under the provisions of the Kansas Constitution, Article 15, §9, and K.S.A. 60-2301:

"60-2301. Homestead; extent of exemption. A homestead to the extent of one hundred and sixty (160) acres of farming land, or of one acre within the limits of an incorporated town or city, occupied as a residence by the family of the owner, together with all the improvements on the same, shall be exempted from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife, when that relation exists; . . ."

6. Reva Stafos, wife of the bankrupt, who occupies the premises with her husband as a homestead and is a joint tenant, did not join in the bankruptcy proceedings.

7. The land in question is unplatted, but zoned "J" Heavy Industry. Two buildings on the property have been used for industrial purposes.

8. The property in the same general vicinity is used for industrial purposes.

9. An experienced realtor testified at the hearing on this matter that the land in question was valued at $10,000 per acre, while farming land in the area was selling for approximately $650 per acre.

10. Some of the land has been used to grow vegetables.

11. The character of the land in question on the date of the filing of the petition was urban industrial as opposed to rural farming land.

Although there is some evidence to support the bankrupt's position, this court is bound upon review by the referee's findings of fact unless they are clearly erroneous. *Washington v. Houston Lumber Company*, 310 F. 2d 881 (10th Cir. 1962). Despite the additional evidence presented by the bankrupt at the hearing on his Petition

for Review, the court is not prepared to overturn the referee's findings, which are amply supported by the evidence. We therefore look to the Kansas law to be applied to these facts.

The referee, in his extensive conclusions, has thoroughly reviewed the Kansas law with respect to the effect of an extension of city limits on the homestead exemption. The Supreme Court of Kansas has steadfastly held, directly or by implication, that the constitutional and statutory provisions must be strictly construed despite the ". . . great hardships . . . attending the unnecessary extension of city limits over lands which could more appropriately be used for agricultural purposes" because the court ". . . is not the proper tribunal to correct that evil." *Sarahas v. Fenlon*, 5 Kan. 592 (1870), at p. 595. See also, *Water-Supply Co. v. Root*, 56 Kan. 187, 42 Pac. 715 (1895); *Fletcher v. Weigel*, 152 Kan. 104, 102 P.2d 1055 (1940). The Kansas cases cited and discussed by the referee follow the general rule as stated in 40 C.J.S. 498, *Homesteads* §57:

> "While there is authority to the contrary, in most jurisdictions where the question has been raised it has been held that, even without the owner's consent and against his wishes, the limits of a city, town, or village may be extended so as to include what was formerly a rural homestead to afford the owner only the amount available as an urban homestead."

The bankrupt here contends that the court should adopt the minority rule:

> "Where the mere fact that land lies within the boundaries of the city, town, or village, is not regarded as necessarily stamping it with the character of urban property for homestead purposes . . ., it is nec-

essary, in order that the owner shall lose the right to a rural homestead and be restricted to the right to an urban homestead, that the land, in addition to being embraced within the extended municipal limits, shall be otherwise actually impressed with an urban character." 40 C.J.S. 498, *Homesteads* §57.

No Kansas case has been found tending to support the minority view. Even if this were the law of Kansas, the referee's findings lead to the conclusion that this land is urban industrial in character and no longer is "farming land" as contemplated by the Constitution.

The referee's findings and conclusions are adopted *in toto*, and his order is affirmed in all respects. The bankrupt is entitled only to the one-acre homestead exemption.

IT IS SO ORDERED.

Dated this 19th day of May, 1972, at Kansas City, Kansas.

/s/ Earl E. O'Connor
United States District Judge

ORDINANCE NO. 45492

(First published March 2, 1966)

AN ORDINANCE extending the City Limits of Kansas City, Kansas

BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF KANSAS CITY, KANSAS:

Section 1. That the boundaries of the City of Kansas City, Kansas, are extended to include a piece of land in Wyandotte County, Kansas, described as follows:

In Sections 16-11-24, 15-11-24, 14-11-24, 13-11-24, 21-11-24, 22-11-24, 23-11-24, and 24-11-24, in Wyandotte and Shawnee Townships:

Detail description of lands annexed is omitted.

Section 2. This ordinance shall be in full force and effect from and after its passage, approval, and publication in The Kansas City Kansan.

PASSED BY THE BOARD OF COMMISSIONERS OF THE CITY OF KANSAS CITY, KANSAS, THIS 1ST DAY OF MARCH, 1966.

/s/ Joseph H. McDowell
Mayor

STIPULATION

It is stipulated by and between the Debtor and the Trustee that the Debtor did, some time during the year 1945, purchase the real estate described in Schedule B(5), and has continuously since that time and to this date, occupied the same as a homestead with his wife and children; that said real estate claimed exempt by debtor is an unplatted tract of land consisting of approximately thirteen and a fraction acres. That the City of Kansas City, Kansas did on or about the 1st day of March, 1966, by its Ordinance Number 45492 extend its corporate limits encompassing the Debtor's homestead hereinbefore referred to. That said real estate is held in joint tenancy by the Debtor and his wife, Reva.

/s/ Robert M. Kaplan
Attorney for Trustee

/s/ Wash H. Brown
Attorney for Debtor

CONSTITUTION OF THE STATE OF KANSAS, ARTICLE 15, SECTION 9:

"Homestead exemption. A homestead to the extent of one hundred and sixty acres of farming land, or of one acre within the limits of an incorporated town or city, occupied as a residence by the family of the owner, together with all the improvements on the same, shall be exempted from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife, when that relation exists; but no property shall be exempt from sale for taxes or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon: Provided, The provisions of this section shall not apply to any process of law obtained by virtue of a lien given by the consent of both husband and wife: And provided further, That the legislature by an appropriate act or acts, clearly framed to avoid abuses, may provide that when it is shown the husband or wife while occupying a homestead is adjudged to be insane, the duly appointed guardian of the insane spouse may be authorized to join with the sane spouse in executing a mortgage upon the homestead, renewing or refinancing an encumbrance thereon which is likely to cause its loss, or in executing a lease thereon authorizing the lessee to explore and produce therefrom oil, gas, coal, lead, zinc, or other minerals."

KANSAS STATUTES ANNOTATED, ARTICLE 23.—EXEMPTIONS, 60-2301:

"Homestead; extent of exemption. A homestead to the extent of one hundred and sixty (160) acres of

farming land, or of one acre within the limits of an incorporated town or city, occupied as a residence by the family of the owner, together with all of the improvements on the same, shall be exempted from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife, when that relation exists; but no property shall be exempt from sale for taxes, or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon. The provisions of this section shall not apply to any process of law obtained by virtue of a lien given by the consent of both husband and wife. (L. 1963, ch. 303, 60-2301; Jan. 1, 1964)

KANSAS STATUTES ANNOTATED, ARTICLE 16.—13-1602a.

"Annexation of adjacent territory; land outside county; procedure; land where hospital maintained; duties of city clerk. Whenever any land adjoining or touching the limits of any city has been subdivided into blocks and lots, or whenever any unplatted piece of land lies within (or mainly within) any city, or any tract not exceeding twenty acres is so situated that two-thirds of any line or boundary thereof lies upon or touches the boundary line of such city, said lands, platted or unplatted, may be added to, taken into and made a part of such city by ordinance duly passed: *Provided, however,* That no such land lying outside of the county in which such city or a part thereof is located may be added to or taken into such city unless petitioned therefor, or consented thereto, in writing, by the owners of a majority of the resident landowners in

the tract or parcel of land proposed to be so annexed or added to such city. Said ordinance shall describe the platted lands by giving the name of the addition or subdivision as platted, and by giving the metes and bounds of the unplatted lands, with the section, township, range, and county in which the same are located.

In adding territory to any city, if it shall become necessary for the purpose of making the boundary line straight or harmonious, a portion of a piece of land may be taken into such city, so long as such portion of the piece taken in does not exceed twenty acres: *Provided further, however,* That any city of the first class having a population of more than 165,000 inhabitants may add to, take in and make a part of such city by ordinance duly passed any unplatted piece of land or tract not exceeding sixty (60) acres if such tract is so situated that two-thirds of any line or boundary thereof lies upon or touches the boundary line of such city: *Provided,* That lands owned by any person, association or company not exceeding twenty (20) acres in extent and upon a portion of which a hospital is being maintained shall not be annexed for any purpose without the consent of the owners of such land: *Provided further,* That before the governing body of any such city shall approve such ordinance the city clerk shall notify the county clerk and the county superintendent in writing at least ten days before approval of said ordinance of the property proposed to be taken into such city, describing said property accurately by metes and bounds. (L. 1933, ch. 129, §1; L. 1953, ch. 96, §1; June 30.)

KANSAS STATUTES ANNOTATED, ARTICLE 5,— ADDITIONS, VACATION, AND LOT FRONTAGE

12-501. Petition for enlargement of boundaries. That whenever any city desires to enlarge the limits thereof from territory adjacent thereto, the governing body of such city shall in the name of the city present a petition to the board of county commissioners of the county in which the city is situated setting forth by metes and bounds the territory sought to be so added and asking said board of county commissioners to make a finding as to the advisability of adding said territory to said city. (L. 1929, ch. 109, §1; May 28.)

12-502. Proceedings on petition. Notice of the time and place of said hearing, together with a description of the property sought to be added to said city, and the names of the owners thereof so far as can be ascertained from the records of said county, shall be published for three consecutive weeks in some newspaper of general circulation in said city.

On the day set the board of county commissioners shall proceed to hear testimony as to the advisability of making such addition, and upon such hearing, if said board of county commissioners shall be satisfied that the adding of such territory to the city will be to its interest and will cause no manifest injury to the persons owning real estate in the territory sought to be added, they shall so find; and thereupon the governing body of such city by ordinance may enlarge the limits thereof to include the territory so added: *Provided,* That the boundary lines of no city shall be extended to include lands not located in the county in which such city is situated, but this restriction shall not apply to cities now located in more than one county:

Provided, That no such proceeding shall be necessary when the territory sought to be added is subdivided into lots and blocks, but in such cases the city shall have power to add such territory to the city by ordinance: *And further provided,* No unplatted territory of over twenty (20) acres shall be taken into said city against the protest of the owner thereof, unless the same is circumscribed by platted territory that is taken into said city and unless said tract to be taken into such city shall be improved property receiving city benefits and protection.

The board of county commissioners may for good cause shown continue such hearing beyond the time specified in the notice without further publication. Application for adding separate parcels of territory to said city may be made in the same petition, and upon such application the board of county commissioners may make findings as to the advisability of adding any or all of such parcels as hereinbefore provided. The order of the board of county commissioners shall be spread at length upon the journal of proceedings of said board, and a certified copy thereof recorded in the office of the register of deeds in such county. (L. 1929, ch. 109, §2; May 28.)

12-502a. Right of appeal. Any owner of land sought to be taken into the limits of a city under the provisions of this act, who shall be aggrieved by the decision of the board of county commissioners may appeal to the district court of the same county in the manner and method as now provided by section 19-223, Revised Statutes of 1923. (L. 1929, ch. 109, §3; May 28.)